SOUTHERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT

EILEEN HENDERSON,
Plaintiff,

-against-

REGENERON PHARMACEUTICALS, INC.,
Defendant.

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04 CV 4553(CLB)(MDF)

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Eileen Henderson, by her attorneys, EGAN LAW FIRM, LLC, respectfully submits this memorandum of law in opposition to the motion of defendant Regeneron Pharmaceuticals Inc. ("Regeneron") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff asks this court to deny defendant's motion on the grounds that with respect to each of plaintiff's causes of action, there are issues of fact for the jury which preclude summary judgment at this time.

In addition to this memorandum, plaintiff is also submitting in opposition to defendant's motion the affirmation of Susan B. Egan ("Egan Aff."), the declarations of Eileen Henderson ("Henderson Dec.") and Jose Monegro ("Monegro Dec.") and an appendix of exhibits to which these documents refer. ("Plaintiff's App.")

Preliminary Statement

Ms. Henderson worked in Shipping and Receiving at defendant Regeneron. She was the only female member of a staff that included three men for the first two years Ms. Henderson was at Regeneron and five for the last year. As is set forth in Ms. Henderson's Declaration, the Egan Affirmation and the affirmation of Jose Monegro, Ms. Henderson found the atmosphere in her department hostile, abusive and disrespectful in the extreme. Through out her employment, she complained repeatedly to her supervisor, Bobby Hoyt, about the treatment she received in the department from him and her co-workers. Hoyt did nothing to halt the conduct or change the atmosphere. Indeed, he was one of its enthusiastic participants. When Ms Henderson could bear it no longer, she complained to Gail Grimaldi in Human Resources in February 2003.

Ms. Henderson's termination from defendant Regeneron was the culmination of a concerted effort by Bobby Hoyt to get rid of her because she was not "one of the guys", she complained to him all the time about being sexually harassed by the loading dock staff, and once she had gone to Human Resources about the treatment she was receiving, it was clear she could cause him and the rest of the all male staff on the loading dock trouble.

Not three weeks after Ms. Henderson complained to Grimaldi, Hoyt began to paper Ms. Henderson's personnel file with complaints about conduct by her which he had not found fault with in the past and for which he did not fault others. A documentary record of misconduct was essential to justify termination at Regeneron. Having received only three memos to her personnel file from Hoyt in her first two years of employment, in the nine months between March 2003 and her termination in November 2003, Hoyt sent more than a dozen memos to her file.

While Hoyt was harassing Ms. Henderson about her alleged misconduct, the behavior of Ms. Henderson's male co-workers got worse. The two new men who joined the staff in Shipping & Receiving at the beginning of 2003 were particularly abusive. Continuing complaints to Hoyt and Grimaldi throughout 2003 about the disrespect with which she was being treated were ignored. The hostility culminated in a physical attack on Ms. Henderson by one of the two new men, Mike Parker. Inexplicably, Regeneron punished Ms. Henderson for the attack, concluding, first, against the weight of evidence and common sense, that Ms. Henderson had provoked Parker and second, having been provoked, Parker's attack on Ms. Henderson was somehow no worse than what in Regeneron's view, Ms. Henderson did.

A month later, Ms. Henderson was fired for her purportedly "long standing and ongoing pattern of failure to follow reasonable instructions from her supervisors and her lack of professionalism, including her pattern of recurrent latenesses and insubordination."

This action followed asserting claims for sexual harassment, sex discrimination, retaliation and intentional infliction of emotional distress.

Defendant contends, basically, that it is entitled to summary judgment on each of Ms. Henderson's claims because none of the things that were done to her, and the defendant doesn't deny that they were done, had anything to do with sex or her gender. It further claims that it is, in any event, protected by the Supreme Court's decision in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) because the conduct she reported first to Hoyt and then to Grimaldi (and again defendant does not deny that the reports were made) allegedly did not related to sex or her gender.

On a motion for summary judgment, the Second Circuit has held

> In deciding a motion for summary judgment, the district court is not to resolve issues of fact but only to determine whether there is a genuine triable issue as to a material fact. In making that determination, the court is required to resolve all ambiguities, and to credit all factual inferences that could rationally be drawn, in favor of the party against whom summary judgment is sought. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989); *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54, 57 (2d Cir. 1987). It is not the province of the court itself to decide what inferences should be drawn, *see, e.g., Cronin v. Aetna Life Insurance Co.*, 46 F.3d at 204; *Chambers v. TRM Copy Centers Corp.*, 43 F.3d at 38; if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper, *see, e.g., Stern v. Trustees of Columbia University*, 131 F.3d at 312; *Brady v. Town of Colchester,* 863 F.2d 205, 210 (2d Cir. 1988).

Howley v. Town of Stratford, 217 F. 3d 141, 150-51 (2d Cir. 2000).

The Second Circuit particularly urges caution when the issue is, as it is here, whether plaintiff's sex caused the conduct at issue.

> In discrimination cases, the inquiry into whether the plaintiff's sex (or race, etc.) caused the conduct at issue often requires an assessment of individuals' motivations and state of mind, matters that call for a 'sparing' use of the summary judgment device because of juries' special advantages over judges in this area. *DiStasio*, 157 F. 3d at 61; accord *Gallagher v. Delaney*, 139 F. 3d 338, 342 (2d Cir. 1998) (noting juries' possession of the 'current real life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions and implicit communications.')
>
> *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir.2001)

Argument

I.

Plaintiff Has Established A Prima Facie Case Of Hostile Environment Sexual Harassment

In order to survive a motion for summary judgment with regard to her hostile environment claim must present evidence from which a reasonable trier of fact could conclude: 1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her employment, and 2) the a specific basis exists for imputing the conduct that created the hostile environment to the employer. *Mack v. Otis Elevator Company* 326 F.3d 116, 122 (2d Cir. 2003). The first element of the claim has both an objective and a subjective element to it. "..the misconduct must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive. *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003).

A. Henderson 's Work Environment Was Objectively Hostile

In an effort to mislead, defendant describes plaintiff's allegations of hostile environment sexual harassment as though they were isolated incidents in an otherwise serene employment experience. Thus, the locker room atmosphere in Shipping and Receiving, including its persistent grabbing and groping, bad language, and sexual war stories is summarized by defendant in it's description of plaintiff's sexual harassment claim as "being exposed to male on male horseplay". The sexual touching, patting and massaging and sexually suggestive talk directed at Ms. Henderson while trying to work in the locker room atmosphere of Shipping and Receiving is described as "four comments involving sexual or gender related innuendo and/or alleged touching of her leg, her back and/or her hair." Constant jokes by her co-workers at her expense demeaning her appearance are described as "sporadic name calling by co-workers concerning her weight and a missing tooth" and the assault by a co-worker towards the end of her employment who had regularly sexually harassed plaintiff over the proceeding 9 months is described as an "altercation." Def. Br. P. 12.

In disaggregating plaintiff's experiences at Regeneron, isolating them from each other when, in fact, the pieces, collectively and cumulatively were part of a very distressing whole work experience, defendant is asking the Court to do precisely what the Second Circuit has forbidden it to do in assessing whether an environment is sufficiently hostile to violate Title VII. In *Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir. 2001), the Second Circuit explained

> Under Title VII, a hostile work environment is one form of disparate treatment on the basis of "race, color, religion, sex or national origin." 42 U.S.C.§2000e-2(a)(1). Whereas other disparate treatment claims may scrutinize discrete harms such as hiring or discharge, a hostile work environment claim

> analyzes a workplace environment as a whole to discover whether it is abusive. (citations omitted)

To decide whether a hostile environment "is sufficiently severe and pervasive" to violate Title VII, the Court must look at the totality of the circumstances.

Within the totality of the circumstances are the "quantity, frequency, and severity of the incidents...factors that must be considered **cumulatively** so that we may obtain a realistic view of the work environment." *Richardson v. New York State Dep't of Correctional Services*, 180 F.3d 426, 437 (2d Cir. 1999). The focus of this inquiry therefore is "the nature of the environment itself". *Perry v Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir. 1997)(other citations omitted) (emphasis added).

Defendant argues that neither the February 12 incident involving Joe Resi or the "altercation" with Mike Parker had any sexual overtones. Plaintiff disputes that assertation. Ms. Henderson's report to Ms. Grimaldi of the argument with Joe Resi particularly focused on disrespectful language and how she was not being accorded the same perquisites as her male co-workers. Henderson Dec. ¶¶ 17-18. However, even if the conduct was without sexual overtones, it is nevertheless relevant to an assessment of the hostility of the environment experienced by Ms. Henderson. In *Alfano v. Costello*, 294 F.3d 365 (2d Cir. 2002), the court specifically rejected the argument that a sex-based hostile work environment claim can be supported only by overtly sexual incidents. Id. at 375.

> There is little question that incidents that are facially sex neutral may sometimes be used to establish a course of sex based discrimination - for instance where the same individual is accused of multiple acts of harassment, some overtly sexual and some not.
>
> Ibid.

A case in point is Ms. Henderson's allegations against Mike Parker. Prior to the assault on Ms. Henderson that defendant claims was without sexual overtones, Parker inquired about her personal life, told her that she needed a "man" like him and that he was going to take her out and "treat her like a lady", told her she looked sexy and howled like a wolf. He rubbed her back and touched her hair and ran hands up and down her legs as well as making fun of her appearance. Egan Aff. ¶¶ 22-26. Assuming arguendo that Parker's physical attack on her following such conduct can be described as "sex neutral", the Second Circuit clearly directs that it should nevertheless be considered in the court's analysis of the hostility of the environment. In *Raniola*, supra, the Court gave as an example it's holding in *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000).

> In *Howley*, the plaintiff presented evidence of sex-based derogatory comments made by a co-worker during a meeting. Afterwards, the same co-worker was insubordinate toward the plaintiff, made false statements undermining her authority and created safety hazards endangering her. The district court granted defendant's motion to dismiss the hostile environment claim holding that a single incident of verbal harassment was insufficient to create a hostile work environment. We vacated the dismissal, finding that given the contents of the derogatory comments, any fact finder would be entitled to infer that any harassment the co-worker directed [at the plaintiff after the verbal abuse] was gender based. (citations omitted)
>
> 243 F.3d at 622

Thus, even if some of the conduct to which Ms. Henderson was subjected was without any sexual overtones, the court may nevertheless consider it in determining whether a jury could infer that it was, notwithstanding its purported sex neutrality, gender based.

Jones v. Smithkline Beecham Corp, 309 F. Supp. 2d 343, 350 (N.D.N.Y. 2004) described by defendant at page 15 of its memorandum as "apt" is simply inapposite. Unlike the instant case, the plaintiff in *Jones* did not spend her days in an all male environment where bad language and crude humor were part of the ordinary day. Moreover, unlike the instant case where much of the conduct complained of was blatantly sexual, none of the conduct plaintiff alleged as harassing had any sexual overtones at all.

B. In Assessing the Hostility of the Environment For the Purposes of Summary Judgment, the Court Must Consider Unreported as Well as Reported Incidents

Defendant argues elsewhere in its memorandum and in another context that plaintiff failed to report the harassment she was being subjected to in accordance with defendant's sexual harassment policy. Plaintiff disputes this assertion. Henderson Dec. ¶¶ 14-15, 17-18. Nevertheless, it is the law in the Second Circuit that the court is to consider even unreported incidents in determining at the summary judgment stage whether the plaintiff has made out a prima facie case of hostile environment sexual harassment.

> The fact that the incidents [of sexual harassment] were or were not reported is irrelevant to a determination of whether or not a hostile environment existed -- the first element of plaintiff's claim. While a fact finder at trial is free to make credibility determinations and may therefore disregard these unreported incidents, at the summary judgment stage the district court must assume that all of plaintiff's allegations pertaining to the issue of a hostile work environment are true and give them no less weight than reported instances. Thus unreported incidents of sexual harassment alleged by the plaintiff regarding the issue of hostile work environment, whether or not an explanation for the failure to report is proffered, stand on the same footing as reported incidents; both must be taken as true at the summary judgment stage.
>
> *DiStasio v. Perkin Elmer Corporation*, 157 F. 3d 55 (2d Cir 1999)

C. Henderson's Work Environment Was Subjectively Hostile

Defendant places great emphasis on testimony of Ms. Henderson's which it says stands for the proposition that she did not find the environment at Regeneron "subjectively" hostile. It quotes Ms. Henderson as testifying at her deposition that she did not consider the behavior to be sexual harassment and "had no problem with it." Def. Br. P. 14.

It is clear from her testimony that Ms. Henderson had no idea what sexual harassment was. (Egan Aff. ¶ 27). As a non-lawyer, that is hardly surprising. That she describes herself as experiencing sexual harassment "a little bit" cannot be treated as an admission that she wasn't "subjectively" offended by the conduct in the face of all of the other evidence that she was. For instance, she repeatedly complained to her supervisor Hoyt about the conduct. She complained to Grimaldi in Human Resources that the language in Shipping and Receiving was profane and not respectful and that she wasn't being treated "like a lady". Egan Aff. ¶¶ 27-31. When she was unable to bring the conduct to a halt, Ms. Henderson tried to find a job in another department. Henderson Aff. ¶ 19.

Though her choice of words may not be expert, even in the sections of her testimony quoted by defendant, Ms. Henderson states that the locker room conduct made her "uncomfortable." The space was small. Plaintiff states that when it was going on in the dining area, she would leave the dining area and go into the office because, "I hear it, but I don't have to see it." Egan Aff. ¶ 29. Ms. Henderson has a high school education. Her choice of words may not precisely express what she means to say.

Further, Ms. Henderson was plainly more than "a little bit" troubled by Mike Parker's attack on her. Regeneron employees who were there at the time described her as "very upset." Dr. Andrew Levin, the forensic psychologist who examined Ms. Henderson for plaintiff, explaining his diagnosis of post-traumatic stress disorder stated:

> Mike Parker's assault of Ms. Henderson on 10/8/03 fulfilled the trauma criteria because it involved both actual and threatened bodily injury. In addition, during the assault, the plaintiff experienced feelings of fear and horror.

Def. Binder Exh. D. P. 22. Egan Aff. ¶ 30.

Here is how Eugene Thomas, one of her co workers described Ms. Henderson when she returned to work after Mike Parker's attack.

> Q. And after they came back, did you make any observations about --
> A. She was a little moodier.
> Q. A little moodier?
> A. Yes.
> Q. What about Mike Parker?
> A. He looked okay to me.
> Q. How was Eileen's moodiness evident to you?
> A. Body language.
> Q. What was it about her body language that seemed moodier to you?
> A. She just wasn't the same as she used to be.
> Thomas 37:18-38:7
>
> Egan Aff. ¶ 31.

D. Defendant is Not Entitled to The *Faragher* Defense

The *Faragher* defense is not available to Regeneron. Where the harasser is the supervisor, and the harassment terminates in a tangible employment action, as it did here the employer is absolutely liable. *Faragher v. City of Boca Raton*, supra, at 118 S. Ct. at 2292-3 (1998). Ms. Henderson's supervisor, Bobby Hoyt, was a regular participant in the locker room antics to which Ms. Henderson objected. Egan Aff ¶ 16. In addition, though he may not have done the touching, rubbing and sexual conversation himself, he was often a enthusiastic witness to it. Henderson Dec. ¶ 33. His failure to stop the harassment by other members of the staff or even discourage it was tantamount to participating in it.

But one doesn't even need to ascribe the offensive conduct to Hoyt to bar defendant from making use of the *Faragher* defense because Hoyt's knowledge of the harassment can be imputed to Regeneron. If the defendant knew of the harassment but did nothing about it, it is liable even it the harasser was a co-worker rather than a supervisor.

> Under Title VII, the employer need not have actual knowledge of the harassment; an employer is considered to have notice of sexual harassment if the employer—or any of its agents or supervisory employees---knew or should have known of the conduct. The question of when an official's actual or constructive knowledge will be imputed to the employer is determined by agency principals. An official's knowledge will be imputed to the employer when:
>
> A) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company; or B) the official is charged with a duty to act on the knowledge and stop the harassment: or C) the official is charged with a duty to inform the company of the harassment. (citations omitted)
>
> *DiStasio v. Perkin Elmer*, supra, 157 F.3d at 63.

Regeneron's sexual harassment clearly charged Hoyt with a duty to act on the harassment. The policy directs employees to report harassment to their supervisor. It states:

> If an employee experiences or witnesses sexual or other unlawful harassment in the workplace, he or she should report it immediately to a supervisor.
>
> Def. Binder Exh. O.

Given the role of supervisors in the sexual harassment policy, Hoyt's knowledge of what was being done to Ms. Henderson is imputable to Regeneron.

It is also true that Henderson availed herself of the "corrective or preventative opportunities provided by the employer." Def. Br. P. 16. She complained often about her harassment to Hoyt and then beginning in February 2003 to Gail Grimaldi. Though Grimaldi insists that Ms. Henderson never advised her that "she considered anything her co-workers said or did to be sexually harassing," she acknowledges that Ms. Henderson complained to her that she was not being treated like a lady, that she was being treated disrespectfully and about the language used by the men in the department. Egan Aff. ¶ 30. Yet, she took no action to investigate Ms. Henderson's allegations or correct or prevent it.

Even if it were the case that Ms. Henderson failed to report her harassment to Grimaldi, Hoyt's failure to respond to Ms. Henderson's complaints would be sufficient to establish the inadequacy of the defendant's procedures. In *DiStasio v. Perkin Elmer Corporation*, supra, the employer argued that the plaintiff should have taken advantage of the other options under the policy and reported it to someone further up the chain when the person to whom she initially reported it was unresponsive. The Second Circuit specifically rejected the argument.

> Implicit in this argument is the notion that the plaintiff has an affirmative duty to bring her allegations to the company's attention in more than one way when she believes the company's response to her harassment complaint is inadequate. We reject this attempt to shift the company's failure to respond onto the plaintiff's shoulders. When a plaintiff reports harassing misconduct in accordance with company policy, she is under no duty to report it a second time before the company is charged with knowledge of it."
>
> 157 F 3d at 65.

The final reason that the Faragher defense is not available to Regeneron is that Grimaldi discouraged Ms. Henderson from complaining about the conduct of her co-workers. Respecting Ms. Henderson's complaints about the language of her co-workers, Grimaldi told her that she considered such language "rough". It was not disrespectful, as Ms. Henderson regarded it, but "unprofessional". She told her to take care of it herself and "go back and tell them I don't want people to speak to me this way". Egan Aff. ¶ 31.

One of the factors to be taken into consideration in determining the reasonableness of the employer's procedures for reporting is whether the employer played any role in preventing it. *DiStasio v. Perkin Elmer Corporation*, supra, 157 F. 3d at 64.

II.

Plaintiff Has Established A Claim Of Retaliation

Defendant claims that Ms. Henderson's claim of retaliation is deficient in three regards: 1) Since the complaints Ms. Henderson made to Ms. Grimaldi allegedly didn't relate to sex or gender, Ms. Henderson was "not opposing a practice made unlawful by Title VII", 2) there is no causal connection to her reports and her termination and 3) the claimed retaliation did not rise to the level of an employment action.

Defendant's first deficiency ignores the complaints that were made to Hoyt and presumes that a jury would agree that what Grimaldi admits Ms. Henderson said to her did not have to do with sex or gender. Ms. Henderson was complaining about bad language and disrespect in a department in which she was the only woman and not being treated like a lady by her co-workers. There can be no question that Hoyt knew what she was complaining about. As to the third deficiency, the complaint is clear that the retaliatory actions complained of were Ms. Henderson's suspension without pay and her termination. There is no question these are both adverse employment actions. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999) (citations omitted).

In addition, plaintiff argues that each of Hoyt's memos to Ms. Henderson's personnel file respecting conduct on her part which had not even been the subject of comment the year before let alone a memo to the file, was retaliatory as well. At a minimum, such memos were "reprimands", a kind of employment action the Second Circuit has already held is adverse. Ibid. But they surely were adverse in this circumstance where they were a necessary prerequisite to Hoyt's ability to terminate Ms. Henderson. As Grimaldi testified, before anyone was terminated, she reviewed the documentation to make sure that termination was appropriate. Egan Aff. ¶ 45. Thus, three weeks after Ms. Henderson reported Hoyt to Grimaldi, Hoyt began making memos to Ms. Henderson's file, creating the documentation necessary for him to call for her termination.

The proximity of Hoyt's campaign to create the documentation necessary to terminate Ms. Henderson to Ms. Henderson's reporting of him to Grimaldi, a scant three weeks, is enough by itself to create the inference that there is a causal connection between Ms. Henderson's report and Hoyt's retaliatory acts.

> In the absence of direct evidence of a retaliatory motive, the requisite nexus between the protected activity and the adverse employment action can be shown through close temporal proximity.
>
> *Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002).

Though the termination itself took place several months after the beginning of Hoyt's campaign, there is no question it was the cumulative effect of Hoyt's memos which defendant used to justify her termination. It was in the words of Grimaldi, the "**documentary record**" of Ms. Henderson's "**long standing**" failure to follow instructions which resulted her termination. Grimaldi Aff. ¶ 2.

III.

Defendant's Reasons For Terminating Ms. Henderson Were Pretextual

The record is replete with evidence that the "long documentary record" of Ms. Henderson's misconduct was entirely pretextual, created by Bobby Hoyt to justify Ms. Henderson's termination. The best evidence is that, but for two notations in her file over her first two years of employment, there was no documentary record of misconduct until 3 weeks after she reported Hoyt to Grimaldi. Moreover, her purported misconduct follows by 3 months a good evaluation of Ms. Henderson by Hoyt, Egan Aff. ¶ 47 and by 2 weeks a meeting with Ms. Henderson in which Hoyt tells her that she is doing a really good job for the Department. Egan Aff. ¶ 45.

Further as Ms. Henderson states, many of Hoyt's complaints about Henderson in 2003 were about conduct that he had not found troublesome during the proceeding two years. Thus, Hoyt allowed Ms. Henderson to come in late so that she could drop her son off at school. Egan Aff. ¶ 51. She then made up the time at lunch or after work.

Some of the accommodations Ms. Henderson sought for her car breaking down and needing time to get her nephew reinstated in school were accommodations of the sort that Hoyt had permitted in the past and which he regularly made available to other members of the staff.

Indeed, the evidence shows that Hoyt was out to get her. When Ms. Henderson returned to work after her suspension in October 2003, Ms. Henderson was absent from work on October 20 to deal with her car. Hoyt had the authority to pay her for the day by borrowing against her personal days for next year, Plaintiff's App. Exh. F, Grimaldi Tr. 204:9, and Hoyt elected not to.

Such proof is concrete evidence of pretext sufficient to withstand defendant's motion for summary judgment.

IV.

Regeneron's Treatment Of Ms. Henderson Following Parker's Assault On Her Was Discriminatory

Plaintiff's claim of discrimination does not rest upon Regeneron's failure to provide her with a pager and a key to the office. Rather these incidents are a part of the overall disrespectful and harassing treatment accorded Ms. Henderson while she was working in Shipping and Receiving. Her claim of discrimination includes Regeneron's discriminatory refusal to provide Ms. Henderson with over time opportunities and its termination of her following Mike Parker's attack.

With regard to each of these instances of discrimination, Ms. Henderson has demonstrated that she has suffered an adverse employment action giving rise to an inference of discriminatory intent. Such an inference is said to arise from the plaintiff is a member of a protected class and that others, not members of the protected class, were treated differently. *McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).*

A. Plaintiff Was Denied the Opportunity To Do Overtime

Defendant's assertion that denial of overtime is not an "adverse employment action subject to Title VII rests entirely on testimony of Ms. Henderson's which defendant claims demonstrates that she only asked for overtime once and that she got it. Krauss Dec. ¶ 21.

Shipping and Receiving didn't have any over time. However, the Facilities Department did. When Facilities had overtime to give out, Mike Kaplan came to Shipping and Receiving and asked Eugene Thomas, Tyrone Gerald and Mike Parker whether they wanted to do the overtime. One did not go to Mike Kaplan for overtime. That wasn't the procedure. Kaplan came to Shipping and Receiving and gave it out to whom he pleased when he had the overtime to give. He never asked Ms. Henderson whether she was interested in doing overtime. Henderson Dec. ¶ 8.

If Ms. Henderson overheard Kaplan talking to her co-workers about overtime, she would ask Kaplan to include her. Ibid. He always had an excuse why he couldn't give it to her. Ibid. Ms. Henderson testified that Kaplan only gave her overtime on that one occasion.

That overtime was consistently provided to the men in her department and not to her is sufficient to permit an inference of discrimination given that defendant offers to no reason for excluding Ms. Henderson from overtime opportunities other than her purported failure to ask. *Marshall v. State of New York Division of State Police,* 18 F. Supp 2d 194,199 (N.D.N.Y. 1998) (citing *Powell v. Syracuse University,* 580 F.2d 1150, 1156 (2d Cir.1978).

The cases defendant cites for the proposition that denial of overtime is not an adverse employment action are distinguishable. In *Montanile v. National Broadcasting Company,* 211 F. Supp 2d 481, 486 (S.D.N.Y. 2002) the court concluded that denial of overtime in the circumstances before it was not an adverse employment action because the defendant had undergone major cutbacks and many others similarly situated to the plaintiff had not gotten overtime as well. In *Richard V. Bell Atlantic* 165 F. Supp.2d 1, 8-9 (D.D.C. 2001) the court held that the defendant had offered legitimate non discriminatory basis for denying the plaintiff overtime, not that denial of overtime was not an adverse employment action. The decision in *Mahoney v. Driscoll*, 727 F. Supp. 50, 52 (1989) turned on plaintiff's failure to request overtime, a circumstance that does not exist in the present case.

Though defendant will undoubtedly argue in reply that Ms. Henderson is not permitted to submit an affidavit in opposition to a motion for summary judgment for the purposes of creating a question of fact where there is in fact none, this "sham affidavit" rule is in fact narrowly circumscribed. For instance, it does not apply when there is additional proof supporting the statement in the affidavit. *Torrico v. International Business Machines Corp.*, 319 F.Supp. 2d 390, 394, n.2 (S.D.N.Y. 2004).

There is other evidence that Ms. Henderson both wanted and needed overtime. During 2003, Ms. Henderson was experiencing serious financial difficulties, severe enough to seek a loan from Regeneron. Egan Aff. ¶ 70. The difficulties persisted throughout the year until her termination requiring her at one point to seek an advance of her salary. When she was unable to get overtime, Ms. Henderson went out and got herself a part time job first at UPS and then at Sam's Club. Ibid. She left those jobs, not because as defendant tries to suggest, that she really didn't need the money but because they were too much. After a full day of work, both jobs had her hauling inventory and stock off the trucks and around the premises.

Under these circumstances, plaintiff's claim for discrimination with regard to the provision of overtime opportunities should survive defendant's motion.

B. Regeneron's Termination of Ms. Henderson Was Discriminatory

Regeneron maintains that there was nothing sexual about Parker's attack on Ms. Henderson. Def. Br. P.13. However, the attack was preceded by repeated incidents of sexual harassment by Parker. He asked her about her private life, told her she needed a man like him who could treat her like a lady. He touched her, touched her hair, rubbed her back, commented that she looked sexy and howled like a wolf causing the other men in the department to laugh at her. Def. Binder Exh. C, Complaint ¶ 12. All of this was done in an environment in which such conduct was not only condoned, but encouraged at least insofar as Supervisor Hoyt made it a point not to stop it. Indeed, it may be that without an atmosphere poisonously disrespectful of women in Shipping and Receiving, the incident might not have happened.

The details of the attack are described in Ms. Henderson's Declaration, the Egan Affirmation and in testimony to which the affirmation refers. It will not be repeated here. It suffices to say here that the attack came to a conclusion when co-workers Resi and Thomas succeeded in pulling Parker off Ms. Henderson and in hanging on to him long enough to get him to go to Human Resources. Egan Aff. ¶ 32.

Parker, Thomas and Resi were first interviewed by Joanne Deyo and Mike Kaplan, the managers of the Facilities Department of which Shipping and Receiving was a part. Mike Kaplan's notes of those first meetings with Joanne Deyo's handwritten comments interspersed are included in Plaintiff's App. as Exhibit I. These notes disclose that Resi stated that "Mike looked very angry and if the situation were to escalate Mike could become violent." A handwritten note inserted by Joanne Deyo states, "Resi stated that MP lunged towards EH. Joe was afraid MP would hit". One of Deyo's handwritten insertions states that while Parker first denied pushing Ms. Henderson, he then admitted pushing her once, but only after the peanut butter had been put on his face. In these notes, Resi is quoted as saying that he had to pull Parker away from Ms. Henderson.

Eugene Thomas told Jose Monegro that he had to grab Parker because he thought Parker was going to beat Ms. Henderson up. He told Monegro that Parker was so angry he almost couldn't hold him down. See Monegro Dec. ¶ 7.

Notwithstanding the foregoing, defendant held plaintiff as responsible for the fight as the attacker and suspended them both without pay. No inquiry was made whether plaintiff was injured. No thought was given to whether it was safe for plaintiff to work in the same work area as her attacker. No consideration was given to what the psychological impact on plaintiff of such an attack might have been. Henderson Dec. ¶ 35.

Indeed, no thought appears to have been given to plaintiff at all. It is clear from Grimaldi's testimony that Regeneron had concluded that Henderson had lied about being attacked and that she had provoked Parker.

Q. She was surprised that you suspended her?
A. She was surprised that we had suspended her without pay. And again I think financially this was really something that was going to hurt. But I think at this point it's something that really needed to be a strong impact that this was not acceptable behavior in the workplace.
Q. What was it about Eileen's conduct that was unacceptable?
A. Smearing peanut butter on someone's face, the shouting, I don't know. Again, this was a situation that was given to me. It was a big thing of unacceptable behavior. There was language, there was shouting, there was she said, he said; he did that, I did that. It was not from the witnesses saying, yes, something had happened. Yes, it was terribly inappropriate. And it shouldn't happen again. And that was what I told Eileen. I said it cannot happen again, this is not the way to behave in the workplace.
Q. So by Friday morning you concluded that she smeared the peanut butter on his face?
A. He still had the peanut butter on his face when he came in the office. When I saw him, he still had peanut butter in his eyes.
Q. But if Mike Parker had lunged at her while she was making a peanut butter sandwich, she might have lifted up her arm like this and peanut butter may have been --
MS. KRAUSS: Objection.
A. Basically what I believe, I got something for you, I got something for you, Mike, and I'm going to give it to you. And I do believe Joe Resi -- I'm trying to think, but I do believe, I understood from the conversation, and it sounded like Joe had -- Eileen had said something, I guess this was where I had gotten it from, probably Mike's conversation, that I got something for you. And she kept on putting the knife in front of his face. And again when I say -- go back to these types of situations, it's a he said-she said. It happens too fast. There was enough things there that said to me both were involved, both needed to be suspended.

Plaintiff's App. Exh. F, Grimaldi Tr. at 169:21-171:24.

Thus, Mike Parker's attack on plaintiff was treated by Regeneron as a crude argument between two people using "unacceptable" language that had been provoked when plaintiff smeared peanut butter on Parker's face. Alternate explanations, which acknowledged the risk at which Parker's conduct put plaintiff or just the possibility that he had physically attacked her, seem not to have been seriously considered. Standing alone, Regeneron's investigation was discriminatory.

Parker and plaintiff were each suspended without pay. They were both ordered to take anger management classes. But Parker did not take his anger management course. Grimaldi felt that the counseling he was doing in connection with the death of his wife was enough. Plaintiff's App. Exh. F, Grimaldi Tr. 210:7. It also true that Ms. Henderson did not do her anger management classes but that was because Regeneron fired her before she had a chance to do them.

Though Regeneron contends that it was not Henderson's involvement in the hostile "argument" with Mike Parker that resulted in her termination, its alleged reasons for terminating her, her "long standing and ongoing pattern of failure to follow reasonable instructions from her supervisors," were evidently pretextual. See Henderson Dec. ¶¶ 20-29.

V.

Plaintiff Made Reasonable Efforts To Find Comparable Employment

Since her termination from Regeneron, plaintiff has revised her resume on Monster.com and posted her resume with Career Builders. She responded on line to several job openings listed on Monster.com but did not receive any responses. During the summer of 2004, she sent out many resumes. She had two interviews at Minolta for the post of administrative assistant. She did not get the job. She interviewed at Riezo for the job of administrative assistant and did not get the job. She submitted applications to B.J's and Stop and Shop for job openings but did not get a job. She also applied for an opening at Washington Mutual, Gorman Communities and SV Trading Inc. also without result.

Plaintiff's search for new employment has been hampered by the extreme emotional distress with which she has been suffering since her termination from Regeneron. See Opinion of Dr. Andrew Levin Def. Binder D, p.26. Until her termination from Regeneron, Ms. Henderson has not had difficulty finding a job. At no other time since she began working, has Ms. Henderson been out of work for as long as the 18 months she has on this occasion. Henderson Dec. ¶ 44. Her usual ability to promptly find work is evidenced by the two part time jobs she was able to locate at Sam's Club and UPS in the middle of 2003. However, plaintiff found her termination from Regeneron and the circumstances leading up to it utterly debilitating.

An employee discharged as the result of discrimination "has an obligation to attempt to mitigate her damages by using reasonable diligence in finding other suitable employment.' " *Hawkins v. 1115 Legal Serv. Care,* 163 F.3d 684, 695 (2d Cir.1998) (quoting *Ford Motor Co. v. EEOC,* 458 U.S. 219, 231, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982)). An employee's duty to mitigate is "not onerous" and does not require that an employee actually find other employment. *Id.; Dailey v. Societe Generale,* 108 F.3d 451, 456 (2d Cir.1997). On this issue, the defendant bears the burden of proving "(1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." *Hawkins,* 163 F.3d at 695; *Dailey,* 108 F.3d at 456. It is only if defendant is able to demonstrate that plaintiff made no efforts to seek employment that defendant can avoid the payment of damages. *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 54 (2d Cir.1998).

Plaintiff plainly satisfies this standard. However, if she does not, it is because of the debilitating effects on plaintiff of defendant's conduct prior to her termination from Regeneron. Where a plaintiff's inability to find work is directly related to the stress caused by the harassment and discrimination plaintiff suffered while employed by defendant, she will not be penalized for failing to secure employment. *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916, 926 (D.Conn. 1989)

VI.

Plaintiff Has Stated A Claim For Intentional Infliction Of Emotional Distress

On October 8, 2003, approximately a month before plaintiff's termination by defendant Regeneron, plaintiff was attacked by a male co-worker several inches taller and 100 pounds heavier than she. Yelling and screaming obscenities at her, he banged her with his body against the copier machine, bruising her leg, and making it impossible for her to escape. When two other co-workers pulled the assaulting co-worker away from plaintiff, she ran from the dining area into the office where she tried frantically to call Human Resources for help. Her attacker, breaking free from his co-workers, followed her into the office where his co-workers grabbed him again and finally able to get him to leave the Shipping and Receiving Department.

Following this event, defendant held plaintiff as responsible for the fight as the attacker and suspended them both without pay. No inquiry was made whether plaintiff was injured. No thought was given to whether it was safe for plaintiff to work in the same work area as her attacker. No consideration was given to what the psychological impact on plaintiff of such an attack might have been. Indeed, no thought appears to have been given to plaintiff at all. Rather, the defendant seems to have concluded that because plaintiff provoked the attack, the attack was somehow justified and Parker's conduct less reprehensible. Egan Aff. ¶¶ 61-63.

Ms. Henderson was clearly injured by the attack.

> She then became the object of a physical assault by one of the men when he became enraged at her. In response to this assault and her termination shortly thereafter, Ms. Henderson developed posttraumatic stress disorder and major depressive disorder resulting in serious impairment to her social and occupational functioning. She continues to suffer these symptoms to the present day.
>
> Levin Report Def. Binder Exhibit D, P. 26.

This is not a case like those cited by defendant in which the sole basis of the claim for intentional infliction are the discriminatory acts themselves. Rather, in the instant case, there are additional facts from which a jury might conclude that Regeneron's handling of the attack and its horrific impact on plaintiff were in fact atrocious, egregious, outrageous, and utterly intolerable in a civilized community. In any event, defendant is surely not entitled to summary judgment on this claim.

Conclusion

For all of the foregoing reasons, the reasons set forth in the accompanying affirmation of Susan B. Egan and Exhibits thereto, the declaration of Eileen Henderson and exhibit thereto, the declaration of Jose Monegro, and the testimonial evidence referred to in plaintiffs' papers and included in defendant's binder of exhibits, it is respectfully requested that the Court deny defendant's motion for summary judgment as to each of plaintiff's causes of action and the matter down for trial.

Dated: New York, New York
June 8, 2005

Respectfully submitted,

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